IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs, v. TYSON FOODS, INC., et al. Defendants.	)	Case No. 4:05-cv-00329-GKF-SAJ

DEFENDANTS' REPLY ON THEIR MOTION FOR PARTIAL JUDGMENT AS A MATTER OF LAW BASED ON PLAINTIFFS' LACK OF STANDING

Oklahoma lacks an ownership or trusteeship interest in the vast majority of the properties and natural resources in the Illinois River Watershed ("IRW" or "Watershed"). Accordingly, it lacks standing to pursue its claims under the natural resource damages ("NRD") provisions of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601-75 ("CERCLA") (Count 2 of the First Amended Complaint ("FAC")), and state law theories of nuisance (Count 4), trespass (Count 6) and unjust enrichment (Count 10) for these properties it does not own or hold in trust.

After years of asserting broad claims over all the properties and natural resources in the million acre Watershed, Oklahoma finally concedes that it does not have standing to sue for damage to properties and natural resources located in Arkansas. *See* Resp. at 2-5, 13-15, 17, 19. Indeed, Oklahoma now argues that it never asserted claims over properties or natural resources in Arkansas. Oklahoma, however, continues to assert that: (1) it has quasi-sovereign and ownership interests in all properties and natural resources in the IRW that are located within Oklahoma; (2) it is the CERCLA trustee for all natural resources within its borders, including those held by private individuals and other CERCLA trustees; and (3) it may still seek to vitiate or supersede Arkansas' statutes governing the use of poultry litter, and regulate lawful conduct in Arkansas according to the wishes of Oklahoma. These arguments are incorrect.

I. Oklahoma's Concessions Should be Embodied In A Court Order

Oklahoma concedes that it cannot assert claims for damages based on alleged environmental injury to properties and natural resources in Arkansas' portion of the IRW. *See* Resp. at 2-3. Specifically, Oklahoma now limits its claims to properties and natural resources in the portion of the Watershed located in Oklahoma. *Id.* at 3.

Oklahoma's new limitations significantly contrast with its previous intransigent

claims over the entire Watershed. Since it filed this blunderbuss lawsuit, Oklahoma has tried to have it both ways by asserting rights over the entire IRW while simultaneously making vague and noncommittal statements about limiting its claims to property and natural resources in Oklahoma. For example, contrary to the statements in Oklahoma's Response, Oklahoma expressly seeks damages and injunctive relief for alleged environmental injuries to all property and natural resources—"including the biota, lands, waters and sediments therein"—within the entire IRW. *See, e.g.*, FAC ¶¶ 3, 5, 22, 30 31, 96, 116, 147. Defendants have repeatedly challenged these over-broad claims, requesting the State clarify and narrow its FAC to Oklahoma. *See, e.g.*, Motion (Dkt. No. 1076-1) (Mar. 12, 2007) at 5-6 (listing motions challenging Oklahoma's claims over properties and natural resources in Arkansas). Oklahoma has steadfastly refused to do so. *See id.* at 6. Only when Defendants were forced to file this motion did Oklahoma concede its lack of standing to sue for alleged injuries in Arkansas.[1]

In addition to giving up its damage claims over the Arkansas portion of the IRW, Oklahoma's Response retreats on several other key points, all of which should be included in an order. In particular, Oklahoma's Response concedes that:

1. Oklahoma seeks no damages for alleged injuries to properties or natural resources located within the Arkansas portion of the IRW. *See* Resp. at 2-5, 13-15, 17, 19.

[1] Indeed, Oklahoma's new concessions contradict representations Oklahoma's private counsel recently made to Magistrate Judge Joyner. Oklahoma alleges that the entire one-million-plus acre IRW constitutes a single CERCLA facility and asserts CERCLA claims over the entire million acres. *See* FAC ¶¶ 72, 81. The State unabashedly reaffirmed this position at a recent hearing before this Court. *See* Trans. of Hearing (Feb. 15, 2007), at 22, lines 8-9 ("THE COURT: So it's the whole watershed? MR. BAKER: That's our allegation, Your Honor."), & 30, lines 16-18 ("THE COURT: What I hear the plaintiff saying is that the entire watershed is their facility and they want to make that clear."); *see also* Order and Opinion (Dkt. No. 1061) (Feb. 26, 2007) at 3 (stating that Oklahoma has asserted CERCLA claims covering the entire Watershed, a "position on the issue [that] is not vague or ambiguous").

2. Oklahoma is not the CERCLA trustee for natural resources located in Arkansas. *See Id.* at 13-15.

3. Oklahoma owns groundwater within Oklahoma only to the extent the groundwater lies beneath land Oklahoma owns. *Id.* at 11.

4. Oklahoma does not assert its trespass claim on the basis of the *parens patriae* doctrine and, therefore, its trespass claim is limited to properties and natural resources the State owns or holds in trust. *Id.* at 17.

To avoid further waste of resources, Defendants request that the Court incorporate Oklahoma's new concessions in an order. Such an order will advance the resolution of this case and avoid further uncertainty about the scope of Oklahoma's claims.

II. The State May Not Advance Claims For Alleged Damage To Properties And Natural Resources Held By Others

Even within Oklahoma's boundaries, the State does not assert that it owns or holds in trust the tens of thousands of privately-held properties in the IRW. Likewise, the State does not allege that it is the sole trustee of natural resources within that area. Rather, Oklahoma argues that it has standing to recover damages and injunctive relief for any injury to any and all property within Oklahoma under the *parens patriae* doctrine. Resp. at 7 (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). This sweeping claim that the government has standing to recover damages and injunctive relief for alleged injuries to private property contradicts a century of *parens patriae* jurisprudence, including the recent Supreme Court decision addressing the doctrine.

Contrary to Oklahoma's assertion that it can recover for injuries allegedly suffered by private landowners, it is well settled that "[i]n order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties . . . ." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982). Thus, the State may "not merely advanc[e] the rights of individual

injured citizens." *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (quoting 17 Charles A. Wright *et al.*, Federal Practice and Procedure: Jurisdiction 2d § 4047 at 223 (1988)). In order to maintain a *parens patriae* suit, the State "must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *State of Oklahoma v. Cook*, 304 U.S. 387, 396 (1938); *Snapp*, 458 U.S. at 600 (noting that a state may not sue to assert the rights of private individuals). Indeed, Oklahoma's Response provides support for this very proposition. *See* Resp. at 9 (citing *State of Maine v. M/V Tamano*, 357 F. Supp. 1097, 1102 (D. Me. 1973) (Maine has standing if the State "can establish damage to her quasi-sovereign interests in her coastal waters and marine life, independent of whatever individual damages may have been sustained by her citizens.").

Here, Oklahoma asserts that thousands of private properties have been polluted with allegedly hazardous substances and seeks damages and injunctive relief to prevent additional injury. *See* FAC ¶¶ 70-77, 90-108, 119-27, 140-47. Oklahoma's claims seek precisely that which the owners of these properties could obtain in a lawsuit and nothing more. A private citizen may assert a CERCLA cost-recovery claim, *see* 42 U.S.C. § 9607(a), file a RCRA citizen suit, *see* 42 U.S.C. § 6972, or sue for trespass, nuisance or unjust enrichment, *see* 50 Okla. Stat. §§ 1-1, 2, 6, 10 (a "private person may maintain an action for a public nuisance if it is specially injurious to himself"), if his or her property is polluted. Thus, because Oklahoma's claims are no different than those other property owners and trustees could assert, the State cannot establish *parens patriae* standing.

Oklahoma relies primarily on *Tennessee Copper*. That case, unlike this one, did not involve Article III standing, but rather addressed the distinction between the remedies

available to private and state litigants. *See* 206 U.S. at 238-39. Suing as *parens patriae*, the State of Georgia was afforded standing to seek the injunctive relief that its private litigant counterparts could not seek. *Id.* at 239. The Court found that Georgia's interest in enjoining industrial plants from polluting its air was "independent of and behind the titles of its citizens." *Id.* at 237. In other words, unlike here, Georgia was suing to obtain a remedy unavailable to the affected private landowners. *See id.*

The Supreme Court recently affirmed this principle in *Massachusetts v. EPA*, 127 S.Ct. 1438, 1454 (2007). In *Massachusetts*, the Court applied *Tennessee Copper* and held Massachusetts had standing to seek an order requiring the EPA to engage in rulemaking to regulate "greenhouse-gas" emissions. *Id.* However, unlike here, the Court recognized that Congress gave Massachusetts procedural standing, *id.* at 1453. Moreover, Massachusetts' standing was grounded, in large part, on alleged injury to state-owned property, not privately-owned property. *Id.* at 1456. Thus, just like Georgia in *Tennessee Copper*, Massachusetts sought something other than to assert claims for damages and injunctive relief that were available to the affected landowners. Notably, unlike here, both *Tennessee Copper* and *Massachusetts* involved state claims over a resource not subjected to private ownership. Neither addresses a state's standing to sue for damages or injunctive relief based on alleged injury to privately-owned lands and waters.

The other cases Oklahoma cites do not contradict the principle that the State has *parens patriae* standing only to assert claims beyond those available to the affected landowner. Neither *State ex rel. Pollution Control Coordinating Board v. Kerr-McGee Corp.*, 619 P.2d 858 (Okla. 1980)—addressing Oklahoma's statutory and common-law

right to regulate and protect wild animals and fish, *see id.* at 861—nor *Hughes v. Oklahoma*, 441 U.S. 322 (1979)—finding an Oklahoma statute concerning the sale and transport of State minnows repugnant to the Commerce Clause, *see id.* at 338-39—even involved *parens patriae* standing issues. The only case remotely similar to this one, *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993), simply confirmed that property owners' claims are not barred by *res judicata* to the extent they are private and thus not covered by previous state claims (the converse of basic *parens patriae* principles). *See id.* at 1470.

That states have standing to sue for alleged injury to their quasi-sovereign or *parens-patriae* interests in certain instances is not in dispute. To do so, however, they must prove their direct interest, apart from the rights of the actual, individual parties in interest. *See Cook*, 304 U.S. at 396. As Oklahoma's Response makes clear, the State claims to own some parcels of property and some natural resources within the IRW. *See* Resp. at 9-11. But the vast majority of Oklahoma's case seeks to recover damages and injunctive relief for injury to land it does not own. *See id.* at 7-20. The State lacks standing to assert these claims of others.

III. Oklahoma Lacks Standing To Assert A CERCLA NRD Claim For Natural Resources Owned, Managed, Held In Trust, Or Controlled By Others

Oklahoma asserts that it is the proper CERCLA NRD trustee for all properties and natural resources within its borders, whether those resources are owned, managed, held in trust, or controlled by others. *See* Resp. at 9, 12-15. Oklahoma is incorrect. CERCLA divides trusteeship for NRDs between states, the federal government and Indian tribes. *See* 42 U.S.C. § 9607(f). The degree to which one of these owns, manages, or controls a natural resource determines whether, for that particular resource, the entity is trustee. *See*

59 Fed. Reg. 14,262, 14,268 (Mar. 25, 1994) ("CERCLA provides that trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control. These relationships are created by Federal, State, local and tribal laws."). Accordingly, Oklahoma's view that it is automatically the CERCLA NRD trustee or co-trustee for all resources within the State is wrong.

Coeur D'Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094, 1114-15 (D. Idaho 2003), on which Oklahoma relies, actually contradicts Oklahoma's argument that the State is always the CERCLA NRD trustee for resources within its boundaries. In *Coeur D'Alene*, the court rejected the argument that the federal government and the Coeur D'Alene Tribe could serve as co-trustees for natural resources belonging to the State of Idaho, which had previously settled its NRD claims. *Id.* While the court acknowledged that "in many instances, co-trustees are the norm and not the exception," it specifically noted that trusteeship itself relies on "which entity, if any, exercises the hands on day-to-day activity of the various natural resources." *Id.* at 1115. Simply put, "the federal government is a trustee over 100% of federal lands . . . the Tribe is trustee over 100% of the lands within reservation boundaries. The State of Idaho is trustee over 100% of the state-owned land. Neither the United States or the Tribe are trustees over land owned by private citizens." *Id.* at 1117.

Moreover, it is well settled that the State is not the trustee for private properties. "CERCLA does not permit private parties to seek recovery for damages to natural resources held in trust by the federal, state or tribal governments nor does it allow public trustees to recover for damages to private property or other 'purely private' interests." *National Ass'n of Mfrs. v. U.S. Dep't of Interiors*, 134 F.3d 1095, 1113 (D.C. Cir. 1998).

See also State of Ohio v. U.S. Dep't of Interior, 880 F.2d 432, 460 (D.C. Cir. 1989) ("The legislative history of CERCLA further illustrates that damage to private property—absent any government involvement, management or control—is not covered by the natural resource damage provisions of the statute.").

Accordingly, as explained in Defendants' motion, Oklahoma lacks standing to assert a CERCLA NRD claim (FAC Count 2) over natural resources it does not own, manage or control, including federal, Indian, and private properties within the IRW. *See* Dkt. No. 1076-1 at 11-12.

IV. Oklahoma Lacks Standing To Assert A Trespass Claim For Properties And Natural Resources Belonging To Others

Oklahoma admits that "trespass involves an actual physical invasion of the property of another," and, therefore, only the property's actual owner can sue for trespass. *See* Resp. at 18 (quoting *Fairlawn Cemetery Ass'n v. First Presbyterian Church*, 496 P.2d 1185, 1187 (Okla. 1972)). *See, e.g.*, *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006). Thus, the State lacks standing to assert a claim for trespass to natural resources and properties owned or held in trust by others. It is undisputed that the Watershed includes significant portions of land (and their corresponding natural resources) over which entities other than the State hold open, notorious, and exclusive ownership interests.[2] Accordingly, Oklahoma's trespass claim (FAC Count 6) must be dismissed as to those properties and resources the State neither owns nor holds in trust.[3]

[2] For example, under Oklahoma law, the State may administer the use of public waters but does not have exclusive possession over them. 82 Okla. Stat. §§ 105.1-.18.

[3] Moreover, whatever rights Oklahoma may have as *parens patriae*, CERCLA preempts Oklahoma's attempt to obtain damages under state law theories using its *parens patriae* authority. *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 n.30 (10th Cir. 2006).

V. Oklahoma Lacks Standing To Assert A Nuisance *Per Se* Claim For Properties And Natural Resources Belonging To Others

The State's nuisance *per se* claim is likewise defective. Oklahoma contends that it maintains both quasi-sovereign and ownership interests over all the natural resources of the Watershed located in Oklahoma. Resp. at 16-17. As explained above, however, the State fails to assert a claim as *parens patriae* that is distinct from the rights of private property owners. Also, as explained in Defendants' previous briefing, Oklahoma has a property interest only in any discrete land (and its natural resources) within the Watershed it actually owns or holds in trust. Dkt No. 1076-1 at 17. Accordingly, Oklahoma's nuisance *per se* claim (FAC Count 4) must fail as to properties and resources not owned or held in trust by the State.

VI. Oklahoma Lacks Standing To Assert A Claim For Unjust Enrichment, Restitution And Disgorgement Relating To Properties And Natural Resources Belonging To Others

Oklahoma's claim for unjust enrichment, restitution and disgorgement also fails. The State relies on its quasi-sovereign and property interests in the natural resources within its borders for standing to raise this claim. Yet, as shown above, the State has no quasi-sovereign standing to assert claims for the property of others when those claims could be asserted by the property owners. *See Snapp*, 458 U.S. at 607; *Cook*, 304 U.S. at 396; *Satsky*, 7 F.3d at 1469. As with its trespass and nuisance claims, the State cannot seek restitution and disgorgement for alleged injuries to lands and waters it does not own. *See Woodring v. Swieter*, 637 S.E.2d 269, 280-81 (N.C. Ct. App. 2006); *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728, 734-35 (Tex. App. 2003).

VII. Oklahoma Cannot Regulate In Arkansas

Finally, although Oklahoma has retreated on its claims for damages and injunctive

relief based on injury to lands and natural resources in Arkansas, *see* Resp. at 2-5, 13-15, 17, 19, it continues to assert that it can regulate the lawful use of poultry litter in Arkansas based upon alleged injuries occurring in Oklahoma, *see id.* at 2. This argument has been the subject of extensive briefing. *See* Defendants' Motion to Dismiss Counts 4-10 of FAC (Dkt. No. 66) (Oct. 3, 2005); Arkansas' Motion to Intervene (Dkt. No. 499) (May 2, 2006). As explained in those briefs, Oklahoma may not set aside Arkansas' statutes governing the use of poultry litter and regulate conduct occurring within Arkansas based upon Oklahoma's wishes.

VIII. Conclusion

The State bears the burden of pleading and proving that it has standing for each of its claims. *State of Utah v. Babbitt*, 137 F.3d 1193, 1204 (10th Cir. 1998); *United States v. Colo. Sup. Ct.*, 87 F.3d 1161, 1164 (10th Cir. 1996). Without identifying the specific properties or natural resources, if any, over which it can claim ownership or trusteeship, Oklahoma lacks standing to pursue Counts 2, 4, 6 and 10 of the FAC.[4] Accordingly, this Court should limit those claims only to discrete properties and natural resources within Oklahoma's portion of the IRW that the State owns or holds in trust. To avoid further waste of resources occasioned by the State's shifting claims, the Court should also enter an order implementing the significant concessions the State has made in its Response.

[4] Recognizing the weakness in its claim of standing to sue for any damage to any property or natural resource in Oklahoma, the State asserts that it does, in fact, own or hold in trust a few specific resources. The State claims that it owns or holds in trust the surface water in definite streams within the Watershed (such as the Illinois River and Lake Tenkiller). *See* Resp. at 10-11, 16, 17-18. While Defendants are presently entitled to judgment that the State lacks standing to sue for injuries to properties and natural resources held by private owners and other CERCLA trustees, Defendants will research the complex historical issue of whether the State was given title to surface waters upon entering the Union and will file additional motions on this issue as appropriate.

Dated: April 13, 2007

Respectfully submitted,

BY: /s/ Jay T. Jorgensen

THOMAS C. GREEN, ESQ.
MARK D. HOPSON, ESQ.
JAY T. JORGENSEN, ESQ.
TIMOTHY K. WEBSTER, ESQ.
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711 (fax)

-AND-

ROBERT W. GEORGE, OBA #18562
MICHAEL R. BOND
KUTAK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-AND-

STEPHEN L. JANTZEN, OBA # 16247
PATRICK M. RYAN, OBA # 7864
PAULA M. BUCHWALD, OBA # 20464
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
OKLAHOMA CITY, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
E-Mail: sjantzen@ryanwhaley.com

ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS, INC.

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

A. SCOTT MCDANIEL, OBA #16460
NICOLE M. LONGWELL, OBA #18771
PHILIP D. HIXON, OBA #19121
McDANIEL LAW FIRM
320 South Boston Avenue, Suite 700
Tulsa, OK 74103

-AND-

SHERRY P. BARTLEY, AR BAR #79009
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201

ATTORNEYS FOR PETERSON FARMS, INC.

BY:____/s/ Jennifer S. Griffin_____

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

JENNIFER S. GRIFFIN
LATHROP & GAGE, L.C.
314 East High Street
Jefferson City, MO 65101

ATTORNEYS FOR WILLOW BROOK FOODS, INC.

BY:___/s/ James M. Graves_____

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

JAMES MARTIN GRAVES, ESQ.
GARY V. WEEKS, ESQ.
BASSETT LAW FIRM
POB 3618
Fayetteville, AR 72702-3618

ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY: /s/ John R. Elrod
(SIGNED BY FILING ATTORNEY WITH PERMISSION)

JOHN R. ELROD
VICKI BRONSON, OBA #20574
CONNER & WINTERS, L.L.P.
211 E. Dickson St.
Fayetteville, AR 72701

BRUCE WAYNE FREEMAN
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, Oklahoma 74172
Telephone: (918) 586-5711.
ATTORNEYS FOR SIMMONS FOODS, INC.

BY: /s/ Robert P. Redemann
(SIGNED BY FILING ATTORNEY WITH PERMISSION)

ROBERT P. REDEMANN, OBA #7454
LAWRENCE W. ZERINGUE, ESQ., OBA # 9996
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710

-AND-

ROBERT E. SANDERS
STEPHEN WILLIAMS
YOUNGWILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
ATTORNEYS FOR CAL-MAINE FARMS, INC. AND CAL-MAINE FOODS, INC.

BY: /s/ John H. Tucker
(SIGNED BY FILING ATTORNEY WITH PERMISSION)

JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100

Tulsa, Oklahoma 74121-1100
Telephone: 918/582-1173
Facsimile: 918/592-3390

-AND-

DELMAR R. EHRICH
BRUCE JONES
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: 612/766-7000
Facsimile: 612/766-1600
ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Adam Scott Weintraub	Terry W. West	Dale Kenyon Williams, Jr.
E. Stephen Williams	Douglas Allen Wilson	J. Ron Wright
Lawrence W. Zeringue	Bobby Jay Coffman	Laura Samuelson
Reuben Davis		

and I further certify that a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage properly paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert Secretary of the Environment State of Oklahoma 3800 N. Classen Oklahoma City, OK 73118 **PLAINTIFF**	William H. Narwold MOTLEY RICE LLC 20 Church Street 17th Floor Hartford, CT 06103 **ATTORNEYS FOR PLAINTIFF**
Monte W. Strout 209 W. Keetoowah Tahlequah, OK 74464 **ATTORNEY FOR CLAIRE WELLS, LOUISE SQUYRES, THIRD-PARTY DEFENDANTS**	Robin Wofford Rt. 2, Box 370 Watts, OK 74964 **PRO SE, THIRD PARTY DEFENDANT**
James R. Lamb D. Jean Lamb STRAYHORN LANDING Rt. 1, Box 253 Gore, OK 74435 **PRO SE, THIRD PARTY DEFENDANTS**	Gordon and Susann Clinton 23605 S. Goodnight Lane Welling, OK 74471 **THIRD PARTY DEFENDANTS**
Kenneth and Jane Spencer James C. Geiger Individually and dba Spencer Ridge Resort Route 1, Box 222 Kansas, OK 74347 **PRO SE, THIRD PARTY DEFENDANTS**	Ancil Maggard c/o Leila Kelly 2615 Stagecoach Dr. Fayetteville, AR 72703 **THIRD PARTY DEFENDANT**
C. Craig Heffington 20144 W. Sixshooter Rd. Cookson, OK 74427 **PRO SE, SIX SHOOTER RESORT AND MARINA, INC., THIRD-PARTY DEFENDANT**	Richard E. Parker Donna S. Parker BURNT CABIN MARINA & RESORT, LLC 34996 S. 502 Road Park Hill, OK 74451 **PRO SE, THIRD PARTY DEFENDANTS**
James D. Morrison Rural Route #1, Box 278 Colcord, OK 74338 **PRO SE, THIRD PARTY DEFENDANT**	Jim R. Bagby Route 2, Box 1711 Westville, OK 74965 **PRO SE, THIRD PARTY DEFENDANT**

Marjorie A. Garman 5116 Hwy. 10 Tahlequah, OK 74464 **THIRD PARTY DEFENDANT**	Doris Mares Dba Cookson Country Store and Cabins P.O. Box 46 Cookson, OK 74424 **PRO SE, THIRD PARTY DEFENDANT**
Eugene Dill P.O. Box 46 Cookson, OK 74424 **PRO SE, THIRD PARTY DEFENDANT**	Linda C. Martin N. Lance Bryan Doerner, Saunders 320 S. Boston Ave., Ste. 500 Tulsa, OK 74103 **THIRD PARTY DEFENDANTS**
John and Virginia Adair Adair Family Trust Route 2, Box 1160 Stilwell, OK 74960 **THIRD PARTY DEFENDANTS**	Charles L. Moulton Arkansas Natural Resources Commission 323 Center St., Ste. 200 Little Rock, AR 72206

/s/ Jay T. Jorgensen
JAY T. JORGENSEN